BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TONI OSTMEYER	)	
Claimant	)	
	)	
VS.	)	
	)	
THE RIGHT SOLUTIONS	)	
Respondent	)	Docket No. 1,030,022
	)	
AND	)	
	)	
AMERICAN HOME ASSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the September 18, 2008 Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on December 3, 2008.

APPEARANCES

Shirla R. McQueen, of Liberal, Kansas, appeared for the claimant. Matthew S. Crowley, of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument the parties agreed that in the event this claim is found compensable, the case should be remanded to the ALJ for further proceedings.

ISSUES

The ALJ concluded that while claimant met her burden of proof of establishing personal injury by accident, her injuries did not arise out of and in the course of her employment. Accordingly, claimant's request for compensation under the Kansas Workers Compensation Act was denied.

The claimant requests review of the ALJ's determination, asserting that the facts surrounding her assault support her contention that her resulting injuries arose out of her employment inasmuch as respondent arranged for her to stay at the hotel where the assault occurred. Thus, the ALJ's Award should be reversed and the entire case should be remanded to the ALJ for further findings of facts with respect to the nature and extent of claimant's impairment and other related issues. Claimant maintains the ALJ's finding that she sustained a personal injury by accident should be affirmed and not be subject to the remand.

Respondent contends that the ALJ's Award should be affirmed in its ultimate result, as claimant's assault did not arise out of and in the course of her employment based upon the principles set forth in *Butera*[1]. But, if any aspect of the Award should be reversed, it should be the ALJ's conclusion that claimant sustained personal injury by accident as claimant failed to prove that any of her physical complaints bear a causal relationship to her assault.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate and fully supported by the record. Accordingly, it is not necessary to repeat those findings and conclusions herein. The Board adopts the findings and conclusions of the ALJ as its own as if specifically set forth herein.

Highly summarized, claimant alleges she sustained an assault in the parking lot of her hotel where she was staying while working as a "traveling nurse" for respondent in Hutchinson, Kansas. The assault occurred on the evening of claimant's day off as she was returning to the hotel from purchasing dinner. Claimant maintains that as a traveling nurse she was, in her view, assigned to stay at a certain hotel while in Hutchinson, and therefore the assault and her resulting injuries constitute a compensable event that arose out of and

---

[1] *Butera v. Fluor Daniel Const. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278 (2001).

in the course of her employment. Respondent does not deny the assault occurred. Rather, respondent argues that claimant failed to prove that she suffered personal injury as a result of the assault. Respondent also argues that the assault did not arise out of and in the course of her employment. Thus, compensation is not due and the ALJ's Award should be affirmed.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[2] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[3] The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[4]

At the time of claimant's assault, she was not working. She was at her hotel, returning from a restaurant and headed to her room from her car. She was clearly not "in the course"of her employment.

However, Kansas recognizes that some professions require the employee to travel as a part of the job. And coverage under the Act is expanded under those circumstances. The clearest example is a traveling salesman, where the employment consists of traveling from account to account within an allotted area.[5] The travel itself, being part of the job and performed under the employer's supervision, is within the Act. Similarly, Kansas considers

---

[2] K.S.A. 44-501(a).

[3] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[4] *Id.*

[5] *Kennedy v. Hull & Dillon Packing Co.*, 130 Kan. 191, 195, 285 Pac. 536 (1930).

an oil driller's driving on roads to assemble his crew to be part of the driller's task, and also within the Act.[6]

The Court of Appeals rather recently addressed this issue in a factual scenario very similar to the one at hand. In *Butera*, the claimant was a pipe fitter whose employer (Fluor Daniels) temporarily relocated him from his home to Kansas to work on a nuclear power plant. He was on his way to work when he was involved in a serious motor vehicle accident. The employer denied the claim and asserted that the accident did not arise out of and in the course of claimant's employment because he was merely commuting to and from the hotel and therefore the claim was precluded under K.S.A. 44-508(f). In framing the issue and considering the facts as well as the judicially carved travel exception, the *Butera* Court specifically noted that:

> Travel itself was not part of Butera's job as a fitter, as it would be when one's job is to pick up a crew or visit accounts. Butera relocated to temporary quarters for the sole purpose of shortening his commute. While he was reimbursed for the hotel, he was not specifically reimbursed for his reduced commute once he relocated to the hotel residence. His off-hours activities were not under Fluor's supervision, and he was not expected to accomplish anything on behalf of Fluor during his off-time.[7]

The *Butera* Court went on to find that at the moment the claimant was injured while commuting from his hotel to the work site, he faced no greater risk than other commuters who were traveling from their permanent residence. Similarly, his employer (Fluor Daniels) did not enjoy some benefit over and above what it would have received had Mr. Butera been a local resident. Accordingly, the claimant's accident was found not to be compensable because he was merely commuting to work, just like every other employee.

Claimant likens her situation to that of the traveling salesman, suggesting that the label "traveling nurse" as well as the fact that she traveled from her home in Hugoton, Kansas to Hutchinson, Kansas for this temporary job assignment (13 weeks), staying at a hotel which she contends was assigned to her, justifies the conclusion that her assault arose out of and in the course of her employment. Like the ALJ, the Board disagrees.

The Board finds that the rationale expressed in *Butera* applies to the instant set of facts. Like Mr. Butera, claimant temporarily relocated from her home to a hotel in Hutchinson, Kansas to perform her work for respondent. By her own testimony these

---

[6] See, e.g., *Bell v. A.D. Allison Drilling Co.*, 175 Kan. 441, 445, 264 P.2d 1069 (1953).

[7] *Butera*, 28 Kan. App. 2d at 546-547.

assignments lasted 13 weeks. Claimant paid for her own hotel costs[8] although it is uncontroverted that respondent negotiated a favorable rate for claimant and its other employees for that hotel. While claimant adamantly maintains the housing coordinator for respondent directed her to the hotel where the assault occurred, the greater weight of the evidence is to the contrary. All of respondent's witnesses agree that the assistance that respondent provides is merely a service and neither claimant nor the other employees are required to use that service or to stay in any of the hotels that are offered to them. In fact, if an employee wants to forego any housing during the assignment, choosing to stay in a tent, that is acceptable to the respondent. And when an employee wishes to change hotels or make other arrangements, the housing coordinator will assist if asked. But in no event is the employee required to stay in any particular place.

Those same employees also testified that claimant was dissatisfied with the first hotel where she was staying and specifically asked to move to the Grand Prairie Hotel. Like the ALJ, the Board is not persuaded that claimant was compelled to stay at the Grand Prairie Hotel or that the facts support the contention that the Grand Prairie exposed claimant to any sort of greater risk than the general public.

At the time of her assault, claimant was on her own time. She was doing nothing in furtherance of her employer and was engaged in personal activities. She was not exposed to any increased risk as a result of her employment. Travel is not an inherent component of her job, regardless of her title as a "traveling nurse". Accordingly, the ALJ's Award conclusion that claimant's assault did not arise out of and in the course of her employment is affirmed.

Although arguably unnecessary, the Board also affirms the ALJ's conclusion that claimant sustained personal injury by accident as a result of her assault. The Board agrees with the ALJ's conclusion that "[t]he preponderance of the evidence establishes that [c]laimant suffered injuries to her low back as a result of the assault in the February 6, 2006 assault in the parking lot of the Grand Prairie hotel."[9]

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated September 18, 2008, is affirmed in all respects.

---

[8] The payment scheme described by claimant is somewhat troubling as it attempts to reclassify wages as per diem in an effort to minimize the tax implications. Regardless, claimant was responsible for the costs of her hotel and that cost was deducted from her weekly paycheck.

[9] ALJ Award (Sept. 18, 2008) at 9.

IT IS SO ORDERED.

Dated this _____ day of January 2009.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Shirla R. McQueen, Attorney for Claimant
Matthew S. Crowley, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge